

CERCLA 108(B) (FINANCIAL ASSURANCE FOR ELECTRIC POWER GENERATION, TRANSMISSION, AND DISTRIBUTION; PETROLEUM AND COAL PRODUCTS MANUFACTURING; AND CHEMICAL MANUFACTURING INDUSTRIES)

ISSUE SUMMARY:

The EPA is developing final rules (decisions), on Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in three industry sectors. These decisions are to be signed for publication in the Federal Register by December 2, 2020. After considering public comment on EPA's proposals to not impose financial responsibility requirements for these sectors under CERCLA 108(b), these rules will finalize decisions for the three industry sectors: (1) the electric power generation, transmission, and distribution industry (84 FR 36535); (2) the petroleum and coal products manufacturing industry (84 FR 74067); and (3) the chemical manufacturing industry (85 FR 10128). Publication of these actions was required by a May 2015 Court Order which established dates for signature for proposal and final action on each industry.

UPCOMING MILESTONES:

- **December 2, 2020** – Court ordered deadline to sign for publication in the Federal Register a notice of its final action on the first industry (Electric Power Generation, Transmission, and Distribution). The Agency has indicated as recently as the Spring 2020 Regulatory Agenda, its intention to sign for publication final actions on all three industries by this date.
- **December 2020 – January 2021** – Anticipated publication of final action in Federal Register. Outreach activities.

BACKGROUND:

CERCLA section 108(b) directs the President to develop requirements that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances at their sites.

The EPA identified classes of facilities within the hardrock mining industry as those for which it would first develop financial responsibility requirements in a *Federal Register* notice dated July 28, 2009. EPA identified the three additional industries that are the subject of this memo in an Advance Notice of Proposed Rulemaking (ANPRM) dated January 6, 2010.

In August 2014, Earthworks, the Sierra Club, Great Basin Resource Watch, Amigos Bravos, Idaho Conservation League, and Communities for a Better Environment filed a lawsuit in the U.S. Court of Appeals for District of Columbia Circuit. The court issued an order establishing rulemaking deadlines for hardrock mining and the industries identified in the 2010 ANPRM.

EPA initially proposed financial responsibility requirements for hardrock mining facilities, and after considering public comments, including substantial critical comments from the hardrock mining industry and states, EPA made a final decision on December 1, 2017, to not impose section 108(b) financial responsibility requirements on these facilities. This decision was challenged by Environmental groups who filed a petition for review challenging the final rule. On July 19, 2019, the D.C. Circuit upheld EPA's regulatory action and denied the petition for review. Particularly relevant to the additional industry classes rulemakings, the court held that EPA reasonably interpreted the statute to

determine the meaning of “risk” in Section 108(b) to relate only to financial risk.¹ In addition, the court stated that “the EPA explained why it concluded that existing federal and state programs and modern mining practices have obviated the need for new financial responsibility requirements.” EPA has employed these interpretations in the analytic framework adopted for the three additional industries.

EPA has met the proposal deadlines for the additional industry classes, publishing proposed decisions to not impose financial responsibility requirements under Section 108(b) of CERCLA for facilities in: (1) the electric power generation, transmission, and distribution industry, which was proposed on July 29, 2019 (84 FR 36535); (2) the petroleum and coal products manufacturing industry, which was proposed on December 23, 2019 (84 FR 74067); and (3) the chemical manufacturing industry, which was proposed on February 21, 2020 (85 FR 10128).

The determinations for each proposed rule were reached separately based on the analyses conducted for each industry, which found that the degree and duration of risk posed by these industries do not warrant financial responsibility requirements under CERCLA Section 108(b). EPA relied on an analytic approach, based on the same statutory interpretation that was upheld by the D.C. Circuit Court in the hardrock mining challenge, to determine whether current risk under a modern regulatory framework rose to a level that warrants imposition of financial responsibility requirements under CERCLA Section 108(b). For all three industries, EPA reached the conclusion that the reduction in risks due to the requirements of existing regulatory programs and voluntary practices combined with reduced costs to the taxpayer, demonstrated by EPA’s cleanup case analyses, existing financial responsibility requirements, and enforcement actions, reduce the need for federally-financed response actions at facilities in these industries.

Similarly, the Agency will be basing determinations in the final rules on individual administrative records for each of the three proposed rulemakings, supported by additional analysis conducted in consideration of comments received in the public comment period for each proposed rule.

KEY EXTERNAL STAKEHOLDERS:

☒ Congress ☒ Industry ☒ States ☒ Tribes ☒ Media ☒ Other Federal
Agency ☒ NGO ☐ Local Governments ☐ Other (name of stakeholder)_____

Key stakeholder concerns included comments in support of the proposals from industry, and comments opposing the proposals, the most substantive from EarthJustice on behalf of the litigant groups.

MOVING FORWARD:

As has been the practice for the CERCLA 108(b) rules, to facilitate the review of the final rule prior to publication in the Federal Register, EPA will make available to the public the final rule and key background documents on the Agency’s website shortly after signature. Outreach activities may include a press release, Federal Register Notice, fact sheet, website updates, tribal notification, and emails to stakeholders around the date of signature.

LEAD OFFICE/REGION: OLEM

OTHER KEY OFFICES/REGIONS: OGC, OECA, OP, ORD

¹ *Idaho Conservation League v. EPA*, 930 F.3d 494 (D.C. Cir. 2019). at 502-504.